Bharwada Bhoginbhai Hirjibhai

Vs

State of Gujarat

Criminal Appeal No. 68 of 1977

(A. P. Sen, M. P. Thakkar JJ)

24.05.1983

JUDGMENT

THAKKAR, J.-

1. To say at the beginning what we cannot help saying at the end : human goodness has limits - human depravity has none. The need of the hour however, is not exasperation.

2. The need of the hour is to mould and evolve the laws so as to make it more sensitive and responsive to the demands of the time in order to resolve the basic problem : Whether, when, and to what extent corroboration to the testimony of victim of rape is essential to establish the charge." And the problem has special significance for the women in India, for while they have often been idolized, adored, and even worshipped, for ages they have also been exploited and denied even handed justice - sixty crores anxious eyes of Indian women are therefore focussed on his problem we will presently address ourselves.

3. The learned Sessions Judge, Mehsana found the appellant, a government servant employed in the Sachivalaya at Gandhinagar, guilty of serious charges of sexual misbehaviour with two young girls (aged about 10 or 12) and convicted the appellant for the offence of rape, outraging the modesty of women, and wrongful confinement. The appeal carried to the High Court substantially failed. The High Court affirmed the order of conviction under Section 342 of the Indian Penal Code for outraging the modesty of the two girls. With regard to the more serious charge of rape on one of the girls, the High Court came to the conclusion that what was established by evidence was an offence of attempt to commit rape and not of rape. Accordingly the conviction under Section 376 was altered into one under Section 376 read with Section 511 of the Indian Penal Code. The appellant has preferred the present appeal with special leave.

4. The incident occurred on Sunday, September 7, 1975, at about 5.30 p.m. at the house of the appellant. The evidence of PW 1 and PW 2 shows that they went to the house of the appellant in order to meet his daughter (belonging to their own age group of 10 or 12) who happened to be their friend. The appellant induced them to enter his house by creating an impression that she was at home, though, in fact she was not. Once they were inside, the appellant closed the door, undressed himself in the presence of both the girls, and exposed himself. He asked PW 2 to indulge in an indecent act. PW 2 started crying and fled from there. PW 1 however could not escape. She was pushed into a cot, and was made to undress. The appellant sexually assaulted her. PW 1 was in distress and was weeping as she went out. She however could not apprise her parents about what had transpired because both of them were out of Gandhinagar (they returned after four or five days).

5. It appears that the parents of PW 1 as well as parents of PW 2 wanted to hush up the matter. Some unexpected developments however forced the issue. The residents of the locality somehow came to know about the incident. And an alert women social worker, PW 5 Kundanben, President of the Mahila Mandal in Sector 17, Gandhinagar, took up the cause. She felt indignant at the way in which the appellant had misbehaved with two girls of the age of his own daughter, who also happened to be friends of his daughter, taking advantage of their helplessness, when no one else was present. Having ascertained from PW 1 and PW 2 as to what had transpired, she felt that the appellant should atone for his infamous conduct. She therefore called on the appellant at his house. It appears that about 500 women of the locality had also gathered near the house of the appellant. Kundanben requested the appellant to apologize publicly in the presence of the women who had assembled there. If the appellant had acceded to this request possibly the matter might have rested there and might not have come to the court. The appellant, however, made it a prestige issue and refused to apologize. Thereupon the police was contacted and a complaint was lodged by PW 1 on September 19, 1975. PW 1 was then sent to the medical officer for medical examination. The medical examination disclosed that there was evidence to show that an attempt to commit rape on her had been made a few days back. The session court as well as the high court have accepted the evidence and concluded that the appellant was guilty of sexual misbehaviour with PW 1 and PW 2 in the manner alleged by the prosecution and established by the evidence of PW 1 and PW 2. Their evidence has been considered to be worthy of acceptance. It is a pure finding of fact records by the sessions Court and affirmed by the High Court. Such a concurrent finding of fact cannot be reopened in an appeal by special leave unless it is established : (1) that the finding is based on no evidence or (2) that the finding is perverse, it being such as no reasonable person could have arrived at even if the evidence was taken at its face value or (3) the finding is based and built on inadmissible evidence, which evidence, if excluded from vision, would negate the prosecution case or substantially discredit or impair it or (4) some vital piece of evidence which would tilt the balance in favour of the convict has been overlooked. disregarded, or wrongly discarded. The present is not a case of such a nature. The finding of recorded by the sessions Court as affirmed by the High Court has been challenged mainly on the basis of minor discrepancies in the evidence. We do not consider it appropriate or permissible to enter upon a reappraisal or reappreciation of the evidence in the context of the minor discrepancies painstakingly highlighted by learned counsel for the appellant. Over much importance cannot be attached to minor discrepancies. The reasons are obvious :

(1) By and large a witness cannot be expected to posses a photographic memory and to recall the details of an incident. It is not as if a video tape is replayed on the mental screen.

(2) Ordinarily it so happens that a witness is overtaken by events. The mental faculties therefore cannot be expected to be attuned to observe the details

(3) The power of observation differ from person to person. What one may notice, another may object or movement might emboss its image on one person's mind, whereas it might go unnoticed on the part of another.

(4) By and large people cannot accurately recall a conversation and reproduce the very words used by them or heard by them. They can only recall the main purport of the conversation. It is unrealistic to expect a witness to be a human tape-recorder.

(5) In regard to exact time of an incident, or the time duration of an occurrence,

> usually, people make their estimates by guess-work on the spur of the moment at the time of interrogation. And one cannot expect people to make very precise or reliable estimates in such matters. Again it depends on the time-sense of individual which varies from person to person.
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> (6) Ordinarily a witness cannot be expected to recall accurately the sequence of events which takes place in rapid succession or in a short time span. A witness is liable to get confused, or mixed up when interrogated later on.
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> (7) A witness, though wholly truthful, is liable to be overawed by the court atmosphere and the piercing cross-examination made by counsel and out of nervousness miss up facts, get confused regarding sequence of events, or fill up details from imagination in the spur of the moment. The subconscious mind of the witness sometimes so operates on account of the fear of looking foolish or being disbelieved though the witness is giving a truthful and honest account of the occurrence witness by him - Perhaps it is sort of a psychological defence me mechanism activated on the spur of the moment.

6. Discrepancies which do not go to the root of the matter and shake the basic version of the witnesses therefore cannot be annexed with undue importance. More so when the all important 'Probabilities factor' echoes in favour of the version narrated by the witness.

7. It is now time to tackle the pivotal issue as regard the need for insisting on corroboration to the testimony of the prosecutrix in sex offences. This court, in Rameshwar V. State of Rajasthan, has declared that corroboration is not sine qua non for a conviction in a rapid case. The utterance of the court in Rameshwar may be replayed across the time-gap of decades which have whistled past, in the inimitable voice of Vivian Bose, J. who spoke for the court :

> The rule, which according to the cases has hardened into one of law, is not that corroboration is essential before there can be a conviction, expect where the circumstances make it safe to dispense with it, must be present to the mind of the judge.... The only rule of law is that this rule of prudence must be present to the mind of the judge or the jury as the case may be and be understood and appreciated by him or time There is no rule of practice that there must, in every case, be corroboration before a conviction can be allowed to stand.

8. And whilst the sands were running out in the time-glass, the crime graph of offenses against women in India has scaling new peaks from day to day. That is why an elaborate rescanning of the jurisprudential sky through the lenses of 'logs' and 'ethos' has been necessitated.

9. In the Indian setting, refusal to act on the testimony of a victim of sexual assault in the absence of corroboration as a rule, is adding insult to injury. Why should the evidence of the girl the woman who complains of rape or sexual molestation be viewed with the aid of spectacles fitted with lenses tinged with doubt, disbelief or suspicion? To do so is to justify the charge of male chauvinism in a male dominated society. We must analyze the argument in support of the need for corroboration and subjects it to relentless and remorseless cross-examination. And we must do so with a logical, and not an opiniated, eye in the light of probabilities with our feet firmly planted on the soil of India and with our eyes focused on the Indian horizon. We must not be swept off the feet by the approach made in the western world which has its own social milieu, of life. Corroboration may be consider

essential to establish a sexual offense in the backdrop of the social ecology of the western world. It is wholly unnecessary to import the said concept on a turnkey basis and to transplant it on the Indian soil regardless of the Indian society, and its profile. The identities of the two words are different. The solution of problems cannot therefore be identical. It is conceivable in the western society that a female may level false accusation as regards sexual molestation against a male for several reasons such as :

(1) The female may be a 'good digger' and may well have an economic motive - to extract money by holding out the gun of prosecution or public exposure.

(2) She may be suffering from psychological neurosis and may seek an escape from the neurotic prison by phantasizing or imagining a situation where she is desired, wanted, and chased by males.

(3) She may want to wreak vengeance on the male for real imaginary wrongs. She may have grudge against a particular male, or males in general, and may have the design to square the account.

(4) She may have been induced to do so in consideration of economics rewards, by person interested in placing the accused in a compromising or embarrassing position, on account of personal or political vendetta.

(5) She may do so to gain notoriety or publicity or to appease her own ego or to satisfy her feeling of self-importance in the context of her inferiority complex.

(6) She may do so on account of jealously.

(7) She may do so win sympathy of others.

(8) She may do so upon being repulsed.

10. By and large this factors are not relevant to India, and the Indian conditions. Without the fear of making to wide a statement, or of overstating the case, it can be said rarely will a girl or a woman in India make false allegations of sexual assault on account of any such factors as has been just a enlisted. The statement is generally true in the context of the urban as also rural society. It also by and large true in the context of the sophisticated, not so sophisticated, and unsophisticated society. Only very rarely can one conceivably come across an exception or two and that too possibly from among the urban elites. Because (1) A girl or a woman in the tradition-born non-permissive society of India would be extremely reluctant even to admit that any incident which is likely to effect on her chastity had ever occurred. (2) She would be conscious of the danger of being ostracized by the society looked down by the society including by her own family members, relatives, friends, and neighbours. (3) She would have to brave the whole world. (4) She would the face risk of losing the love and respect of her own husband and near relatives, and of her matrimonial home and happiness being shattered. (5) If she is unmarried, she would apprehend that it would be difficult to secure an alliance with a suitable match from a respectable or an acceptable family. (6) It would almost inevitably and almost invariably result in mental torture and suffering to herself. (7) The fear of being taunted by others will always haunt her. (8) She would feel extremely embarrassed in relating the incident to other being overpowered by a feeling of shame on account of the upbringing in a tradition-bound society where by and large sex is taboo. (9) The natural inclination would be to avoid giving publicity to the incident lest the family names and family honour is brought into

controversy. (10) The parents of an unmarried girl as also the husband members of the husband's family name and family honour. (11) The fear of the victim herself being considered to be promiscuous or in some way responsible for the interrogation by the investigating by counsel for the culprit, and the risk of being disbelieved, act as a deterrent.

11. In view of these factors the victims and their relatives, are not too keen to bring the culprit to books. And when in the face of these factors the crime is brought to light there is built-in assurance that the charge is genuine rather than fabricated. On principle the evidence of the victim of sexual assault stands on par with evidence of an injured witness. Just as a witness who has sustained an injury (which is not shown believed to be self-inflicted) is the best witness in the sense that he is at least likely to exculpate the real offender, the evidence of a victim of a sex offence is entitled to great weight, absence of corroboration notwithstanding. And while corroboration in the form of eye-witness account of an independent witness may often be forthcoming in physical assault cases, such evidence cannot be expected in sex offences, having regard to the very nature of the offence. It would therefore be adding insult to injury to insist on corroboration drawing inspiration from the rules devised by the courts in the western world (obeisance to which has perhaps become a habit presumably on account of the colonial hangover). We are therefore of the opinion that if the evidence of the victim does not suffer from any basic infirmity, and the 'probabilities factor' does not render it unworthy of credence, as a general rule, there is no reason to insist on corroboration except from the medical evidence, where, having regard to the circumstances of the case, medical evidence can be expected to be forthcoming, subject to the following qualification : Corroboration may be insisted upon when a woman having attained majority is found in a compromising position and there is a likelihood of her having levelled such an accusation on account of the instinct of self-preservation. Or when the 'probabilities factor' is found to be out of tune.

12. Now we return to the facts of the present case. Testing the evidence from this perspective, the evidence of PW 1 and PW 2 inspire confidence. The only motive suggested by defence was that there was some history of past trade union rivalry between the father of PW 2 and the appellant. It must be realised that having regard to the prevailing mores of the Indian society, it is inconceivable that a girl of 10 or 12 would invent on her own a false story of sexual molestation. Even at the age of 10 or 12 a girl in India can be trusted to be aware of the fact that the reputation of the entire family would be jeopardised upon such a story being spread. She can be trusted to know that in the Indian society here own future chances of getting married and settling down in a respectable or acceptable family would be greatly marred if any such story calling into question her chastity were to gain circulation in the society. It is also unthinkable that the parents would tutor their minor daughter to invent such a story in order to wreak vengeance on someone. They would not do so for the simple reason that it would bring down their own social status in the society apart from ruining the future prospects of their own child. They would also be expected to be conscious of the traumatic effect on the psychology of the child and the disastrous consequences likely to ensue when she grows up. She herself would prefer to suffer the injury and the harassment, rather than to undergo the harrowing experience of lodging a complaint in regard to a charge reflecting on her own chastity. We therefore refuse to countenance the suggestion made by the defence that the appellant has been falsely roped in at the instance of the father of PW 2 who was supposed to have some enmity against the appellant. It is unthinkable that the parent of PW 2 would tutor her to invent a story of sexual misbehaviour on the part of the appellant merely in order to implicate him on account of past trade union rivalry. The parents would have also realised the danger of traumatic effect on the psychology of their daughter. In fact it would have been considered to be extremely distasteful to broach the subject. It is unthinkable that the parents would go the length of inventing a story of sexual assault on their own daughter and tutor her to narrate such a version which would

bring down their own social status and spoil their reputation in society. Ordinarily no parents would do so in Indian society as at present. Under the circumstances the defence version that the father of PW 2 had tutored her to concoct a false version in order to falsely implicate the appellant must be unceremoniously thrown overboard. Besides, why should the parents of PW 1 mar the future prospects of their own daughter ? It is not alleged that PW 1 had any motive to falsely implicate the appellant. So also it is not even suggested why PW 1 should falsely implicate the appellant. From the standpoint of probabilities it is not possible to countenance the suggestion that a false story has been concocted in order to falsely implicate the appellant. The medical evidence provided by PW 6, Dr. Hemangini Desai, fully supports the finding of the High Court that there was an attempt to commit rape on PW 1. Under the circumstances the conclusion reached by the High Court cannot be successfully assailed.

13. The only question that now remains to be considered is as regards the sentence. The appellant has behaved in a shockingly indecent manner. The magnitude of his offence cannot be over-emphasised in the context of the fact that he misused his position as a father of a girl friend of PW 1 an PW 2. PW 1 an PW 2 were visiting his house unhesitatingly because of the fact that his daughter was their friend. To have misused this position and to have tricked them into entering the house, and to have taken undue advantage of the situation by subjecting them to sexual harassment, is a crime of which a serious view must be taken. But for the following facts and circumstances, we would not have countenanced the prayer for leniency addressed to us on behalf of the appellant. The special circumstances are these. The appellant has lost his job in view of the conviction recorded be the High Court. The incident occurred some seven years back. The appeal preferred to the High Court was dismissed on November 15, 1976. About six and a half years have elapsed thereafter. In the view that we are taking the appellant will have to be sent back to jail after an interval of about six and a half years. The appellant must have suffered great humiliation in the society. The prospects of getting a suitable match for his own daughter have perhaps been married in view of the stigma in the wake of the finding of guilt recorded against him in the context of such an offence. Taking into account the cumulative effect of these circumstances, and an overall view of the matter, we are of the opinion that the ends of justice will be satisfied if the substantive sentence imposed by the High Court for the offence under Section 376 read with Section 511 is reduced from one of 2 1/2 years' RI, to one of 15 months' RI. The sentence of fine, and in default of fine, will of course remain undisturbed. So also the sentence imposed in the context of the offence under Section 342 and Section 354 of the Indian Penal Code will remain intact. Subject to the modification in the sentence to the aforesaid extent the appeal fails and is dismissed. The appellant shall surrender in order to undergo the sentence. The bail bonds will stand cancelled.

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